93-8040

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANK BASIL McFARLAND,

Petitioner,

v.

JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. In view of both equitable principles governing habeas corpus and Congress' creation of a mandatory right to counsel in 21 U.S.C. § 848(q)(4)(B), did the district court err by applying the traditional Barefoot standard governing stays of execution to Petitioner, a death-sentenced habeas petitioner who filed a skeletal habeas petition solely to invoke the district court's jurisdiction to grant a stay in order to appoint counsel?

2. (a) Did the Court of Appeals err by dismissing Petitioner's appeal as moot?

   (b) Even if Petitioner's appeal is otherwise moot, is the larger issue raised on appeal nevertheless justiciable because it is "capable of repetition yet evading review"?

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Petitioner, **FRANK BASIL McFARLAND,** respectfully requests that the Court grant Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Petitioner also requests that this case be consolidated with McFarland v. Collins, No. 93-6497 (pending on writ of certiorari).

CITATION TO OPINION BELOW

The United States Court of Appeals for the Fifth Circuit dismissed as moot Petitioner's appeal from the order of the federal district court refusing to stay Petitioner's execution and -- implicitly -- refusing to appoint counsel. See McFarland v. Collins, 8 F.3d 256 (5th Cir. Nov. 19, 1993). That opinion is attached hereto as **Appendix A.** A copy of the district court's order is attached as **Appendix B.**

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254. Jurisdiction in the district court existed under 28 U.S.C. §§ 1331, 1366, 1651(a), 2241, 2251, & 2254. In the Court of Appeals, jurisdiction was invoked pursuant to 28 U.S.C. §§ 1291(a) & 2253.

STATUTORY PROVISIONS INVOLVED

The issue in the case concerns two federal statutes: The habeas corpus statute affording federal courts the authority to stay the execution of a state court judgment of conviction and sentence in a capital case, 28 U.S.C. §2251, and the provision in the Criminal Justice Act requiring the appointment of federal habeas counsel, 21 U.S.C. §848(q)(4)(B).

STATEMENT OF THE CASE

I. Procedural and Factual Background

This case involves the same parties and is closely related to McFarland v. Collins, No. 93-6497 ["McFarland I"], which is scheduled for oral argument before this Court on March 29, 1994. The issue in McFarland I is whether a death-sentenced prisoner must file a document denominated as a habeas corpus "petition" before a federal district court has any authority to issue a stay of execution so that counsel may be appointed pursuant to 21 U.S.C. § 848(q)(4)(B). This case raises the issue of whether an admittedly perfunctory habeas "petition," which was prepared without the meaningful assistance of counsel and accompanied by a motion for appointment of counsel and motion for leave to file an amended petition, should be subject to the Barefoot standard governing stays of execution.[1] The procedural history of McFarland I is set forth in Petitioner's Brief filed in that case. Rather than repeat that herein, Petitioner will instead focus on the procedural events occurring after the district court and court of appeals denied his *pro se* motion for stay of execution and appointment of counsel. See McFarland v. Collins, 7 F.3d 47 (5th Cir. Oct. 26, 1993), cert. granted, 126 L.Ed 2d 446 (1993).

During the afternoon prior to Petitioner's scheduled execution -- shortly before the Fifth Circuit denied Petitioner's appeal in McFarland I -- a federal magistrate in the Northern District of Texas contacted a local Fort Worth attorney, Danny D. Burns, and

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[1] See Barefoot v. Estelle, 463 U.S. 880 (1983).

asked him whether he would accept appointment in Petitioner's case. As further recounted in Petitioner's Brief in McFarland v. Collins, No. 93-6497:

> Later, district court personnel told Mr. Burns that the court did not have jurisdiction to appoint him but that the court might grant a stay and appoint him if he were to file a document entitled a "petition for writ of habeas corpus" and agree to represent the petitioner. Concluding that the risk of filing such a perfunctory petition ... was outweighed by the risk that no stay at all would issue, Mr. Burns complied.[2]

McFarland v. Collins, Petitioner's Brief, at p.14 n.10, No. 93-6497 (pending on writ of certiorari). The "petition," prepared in the space if a few hours, merely raised one issue by adapting portions of the brief that had been filed by Mr. McFarland's court-appointed attorney on direct appeal. Along with the "petition," Petitioner filed a motion for stay of execution and motion for leave to file an amended petition. The State of Texas did not oppose Petitioner's motion for stay.

Unexpectedly, a few hours after the perfunctory habeas corpus "petition" was filed, the district court denied a stay of execution. The court did not deny or dismiss the petition itself, however. See McFarland v. Collins, No. 4:93-CV-723-A, unpublished slip op. (W.D. Tex. Oct. 26, 1993). But the court did hold that application of this Court's standard for stays, see Barefoot v. Estelle, 463 U.S. 880 (1983), required "the presence of substantial

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[2] Cf. Gosch v. Collins, 1993 U.S. App. LEXIS 29086 (5th Cir. Sept. 16, 1993) (cert. pending) The procedural history of Gosch -- and its relevance to Mr. McFarland's case -- is discussed in McFarland v. Collins, No. 93-6497, Petitioner's Brief, at 6-714 n.10.

grounds upon which relief might be granted." McFarland, slip op., at 2. The court held that the admittedly perfunctory "petition" offered no such grounds. See id. In a collateral order, the district court also denied Petitioner's motion for leave to file an amended petition.

Petitioner, by that point assisted by undersigned counsel from the Texas Resource Center, as well as Danny Burns,[3] immediately appealed the district court's orders to the court of appeals.[4] A divided Fifth Circuit issued a stay at approximately

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[3] The pleadings filed in the court of appeals included a "statement of counsel," which informed the court that Mr. Burns objected to the district court's refusal to appoint him after a federal magistrate had promised such an appointment would occur (along with a stay) if a perfunctory "petition" were filed. Mr. Burns also stated that he "represented" Petitioner on appeal only for the limited purpose of vindicating Petitioner's right to counsel. Likewise, counsel from the Resource Center stated that they were "representing" Petitioner only in order to vindicate his right to counsel. See Application for Certificate of Probable Cause and Stay of Execution, at 2. Mr. Burns, who was never appointed under 21 U.S.C. § 848(q)(4)(B), has since ceased his *pro bono* representation of Petitioner.

[4] The appeal raised numerous claims, including:

> (i) Mr. McFarland Is Entitled To A Certificate of Probable Cause and a Stay of Execution from this Court.
>
> (ii) The District Court, Which Unquestionably Possessed Jurisdiction, Erred by Failing to Grant a Stay of Execution. In So Doing, the District Court Violated 21 U.S.C. § 848(q)(4)(B) and Petitioner's Constitutional Right to Habeas Counsel.
>
> (iii) By refusing to permit Petitioner to amend his petition, the District Court violated FED. R. CIV. PRO. 15(a).

Application for Certificate of Probable Cause and Appointment of Counsel, at 3.

12:00 EST, noting that the State had not opposed a stay. McFarland v. Collins, 8 F.3d 258 (5th Cir. 1993).

Two days later, Mr. Burns voluntarily dismissed the perfunctory habeas corpus "petition" pursuant to FED. R. CIV. PRO. 41(a). See McFarland v. Collins, Notice of Dismissal of Petition for Writ of Habeas Corpus, No. 4:93-CV-723-A (filed Oct. 28, 1993). Mr. Burns explained that the "petition" was being dismissed because:

> As this Court is well aware, that "petition" was wholly inadequate by any standard of attorney competence and was only filed in view of the exigent circumstances, i.e., to prevent the execution of Petitioner before he, through the meaningful assistance of habeas counsel, could have the opportunity to file a genuine habeas corpus petition.
>
> Because both the Fifth Circuit and United States Supreme Court have entered stays of execution, the reason for filing the perfunctory "petition" in this Court no longer exists. By proceeding on the pending petition, Mr. McFarland risks being deprived of a meaningful opportunity to litigate all meritorious challenges to his conviction and death sentence not raised in the petition under Rule 9(b). Thus, Petitioner voluntarily dismisses his petition without prejudice, as provided for in Rule 41(a).

Petitioner's temporary counsel from the Texas Resource Center shortly thereafter wrote a letter brief to the court of appeals explaining why the "petition" was being dismissed:

> Once stays were entered by this Court and the United States Supreme Court, however, Petitioner believed that a voluntary dismissal of his petition was necessary because failure to do so could irreparably prejudice Petitioner's rights. In a recent Texas capital habeas case, a federal district court denied a stay and ruled on the merits of a perfunctory "petition" filed for the identical reasons that the "petition" in the instant case was filed. See Gosch v. Collins, No. SA-93-CA-731 (W.D. Tex. September 15, 1993), aff'd, Gosch v. Collins, ___

F.3d ___ (5th Cir. September 16, 1993), cert. pending (petition filed September 16, 1993).

Letter from Mandy Welch to Honorable Charles R. Fulbruge, III, Clerk of the United States Court of Appeals for the Fifth Circuit, November 1, 1993. The letter further explained that a similar ruling by the district court in this case would have placed Mr. McFarland in a successive habeas posture, thus subjecting him to the abuse of the writ doctrine, even though, because of his indigency, he has never been meaningfully represented by counsel in the post-conviction stage. Finally, the letter brief contended that the pending appeal was not moot because of Petitioner's voluntary dismissal of the perfunctory "petition. See id.

Rejecting that argument, the Fifth Circuit dismissed the appeal and lifted its stay as moot. McFarland v. Collins, 8 F.3d 256 (5th Cir. 1993). The court reasoned that:

> Petitioner is no longer seeking any habeas relief. Any decision by this Court whether the dismissed habeas petition did or did not show substantial grounds on which relief could be granted would be purely advisory. The dismissal of the habeas [petition] rendered the question moot. We are unpersuaded by the suggestion that Petitioner's claimed violation of his right to meaningful assistance of counsel by the denial of the stay remains justiciable because it is "capable of repetition yet evading review." ... [N]ow that Petitioner has counsel, and now that his execution has been delayed by both a stay granted by this Court and a stay granted by the Supreme Court in a related case, counsel has a continuing opportunity to review McFarland's case. Petitioner now has both counsel and a stay. We can grant him no further relief in this appeal. Accordingly, the appeal is dismissed as moot; [the] stay [is] lifted.

Id. at 257.

II. How the Issues Were Raised and Decided Below

Petitioner filed a habeas corpus petition (albeit a perfunctory one), a motion for leave to file an amended petition, and a motion for stay of execution and appointment of counsel pursuant to 21 U.S.C. § 848(q)(4)(B) in the district court on October 26, 1993. The motion for stay and motion for leave to file an amended petition were expressly denied in written orders issued on that same date. The district court refused to act on Petitioner's motion for appointment of counsel, thus effectively denying it under the circumstances of the case.[5] The district court did not rule on Petitioner's habeas corpus petition itself. Petitioner filed an appeal to the United States Court of Appeals for the Fifth Circuit, which contended that the district court erred in denying a stay and appointment of counsel. The court of appeals held that the stay issue was moot because Petitioner had obtained a stay from the court previously, see McFarland v. Collins, 8 F.3d 258 (5th Cir. 1993), and that this Court had also entered in a stay in McFarland's related case, see McFarland v. Collins, ___ U.S. ___. No. 93-6497 (pending on writ of certiorari). The court further reasoned that the specific issue of whether the district court's denial of a stay violated Petitioner's right to counsel was moot because "Petitioner [now] has counsel" and counsel has "a continuing opportunity to review Mr. McFarland's case."

[5] That is, because the district court denied a stay of Petitioner's imminent execution, the court also effectively denied Petitioner's motion for appointment of counsel because an execution would have obviously rendered Petitioner's statutory right to counsel meaningless.

McFarland, 8 F.3d at 257. The court further held that "[t]he motion for appointment [of counsel] filed in this matter was not ruled on by the district court, so there is no action to review." Id. at 257 n.1.

REASONS FOR GRANTING THE WRIT

I. IN VIEW OF BOTH EQUITABLE PRINCIPLES GOVERNING HABEAS CORPUS AND CONGRESS' CREATION OF A MANDATORY RIGHT TO HABEAS COUNSEL, THE DISTRICT COURT ERRED IN APPLYING THE BAREFOOT STANDARD GOVERNING STAYS OF EXECUTION TO PETITIONER'S CASE.

A. The Barefoot standard is inappropriate under the circumstances of this case in view of 21 U.S.C. § 848(q)(4)(B).

In Barefoot v. Estelle, 463 U.S. 880 (1983), this Court set forth the standard governing stays of execution issued by lower federal courts in capital habeas corpus appeals. Among other things, this Court held that a federal habeas petitioner must make "'a substantial showing of the denial of [a] federal right'" in order to obtain a stay. Id. at 893. (citations omitted). The Court went on to define the nature of such a showing:

> [P]etitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further."

Id. at 893 n.4.

The district court's reliance on the Barefoot standard in this case, and the Fifth Circuit's reliance on that standard in a case presenting virtually identical circumstances,[6] was misplaced.

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[6] See Gosch v. Collins, 1993 U.S. App. LEXIS 29086 (5th Cir. Sept. 16, 1993) (cert. pending) (denial of stay and certificate of probable cause). The Gosch decision is discussed above. Although the Fifth Circuit entered a stay of execution in this case (which it has since vacated), the court presumably did not overrule Gosch. Indeed, the court of appeals, over a vigorous dissent from Judge Jones, made it clear that a stay of execution was entered only because of the late hour of the appeal and the fact that the State did not oppose a stay. See McFarland v. Collins, 8 F.3d 258 (5th Cir. 1993).

Simply put, a habeas petitioner such as Mr. McFarland -- who filed a perfunctory habeas "petition" solely to satisfy the district court's prior holding that it lacked jurisdiction to stay Petitioner's execution and appoint counsel pursuant to 21 U.S.C. § 848(q)(4)(B)[7] -- should not be subject to a standard that presupposes that the petition was prepared by competent counsel. A stay is necessary for the very reason that appointed counsel needs a reasonable amount of time to prepare a meaningful habeas pleading, which may only be done after thorough legal and factual research.[8]. In McCleskey, the Court effectively restricted state court defendants to a single federal habeas appeal in the vast majority of cases.[9] Barefoot's standard should only be applied *after* counsel has had an opportunity to prepare such a meaningful

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[7] The district court's jurisdictional holding was, of course, affirmed in McFarland v. Collins, 7 F.3d 47 (5th Cir. 1993), cert. granted, McFarland v. Collins, No. 93-6497 (cert. granted Nov. 29, 1993).

[8] As another federal habeas court has observed regarding the role of habeas counsel:

> There is no dispute that as a result of [McCleskey v. Zant, 111 S. Ct. 1454 (1991)],

it is now "reasonably necessary" for [federal habeas] counsel [appointed under this statute] to investigate and present all claims in the first [federal habeas] petition. McCleskey made clear that attorneys must raise all claims, not merely those claims known to the petitioner at the time of filing [a habeas petition], but also those claims that a reasonable investigation would have revealed. *Faced with this obligation, an attorney must review the record, conduct a preliminary factual investigation, and ensure that all claims for relief have been uncovered and evaluated.*

Coleman v. Vasquez, 771 F. Supp. 300, 302 (N.D. Cal. 1991) (emphasis added).

pleading.

In the instant case, under the clear command of 21 U.S.C. § 848(q)(4)(B), the district court had little if any discretion about whether to stay Petitioner's imminent execution and appoint *permanent* counsel who can actually represent Petitioner.[10] The plain language of that statute unequivocally *required* the district court to appoint post-conviction counsel who could undertake genuine representation of Mr. McFarland's case. See id. ("In any post conviction proceeding under section 2254 . . . of Title 28, seeking to vacate or set aside a death sentence, any defendant who is . . . financially unable to obtain adequate [legal] representation . . . or other reasonably necessary services *shall be entitled* to the appointment of one or more attorneys . . . . ") (emphasis added). The mandate of § 848(q)(4)(B) can be effectuated only if a district court stays a capital habeas petitioner's execution for a reasonable time so that counsel can have a real opportunity to prepare a meaningful habeas corpus petition.

B. Equitable principles required a stay of execution under the circumstances of this case.

The district court's denial of a stay is also inconsistent with the larger equities present in this case. See Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (habeas corpus has "traditionally been regarded as governed by equitable principles"). A first-time

[10] Undersigned counsel continues to represent Petitioner solely for the limited purpose of vindicating his right to counsel.

capital habeas petitioner does not merit such summary treatment, particularly when he has not actually been represented by an attorney. No attorney has carefully reviewed the record to identify potentially meritorious constitutional claims. Nor has any federal or state habeas court reviewed the record. This was Petitioner's *first* habeas corpus petition of any type, state or federal. His direct appeal certiorari petition was denied by this Court in June of 1993. The Texas habeas courts denied Petitioner a simple stay to enable *pro bono* counsel[11] to be obtained. Such counsel is necessary to exhaust the potential federal constitutional claims not raised on direct appeal to the Texas Court of Criminal Appeals; of course, exhaustion of state court remedies is a prerequisite to raising such claims in federal court.

Even critics of the pace of capital habeas corpus proceedings have never suggested that such expedited, "sham" procedures are appropriate. See, e.g., Judge Edith H. Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. B. J. 850, 851-52 (1990). The district court's order effectively denied Petitioner's statutory right to counsel in his federal habeas proceedings.

The federal courts have had a long history of assuring that capital defendants are afforded careful review in both state and federal court, before the State carries out the penalty of death. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932). The instant case, albeit in the context of habeas corpus rather than at trial,

[11] The State of Texas does not compensate counsel for representing of death row inmates who file post-conviction habeas corpus petitions in state court.

strongly resembles the facade of legal representation of a capital defendant that this Court condemned in Powell over six decades ago. See Powell, 287 U.S. at 56, 58 ("[T]his action of the trial judge in respect of appointment of counsel was little more than an . . . gesture . . . . The [capital] defendants . . . were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.").

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE LARGER ISSUE RAISED ON THIS APPEAL IS MOOT.

As discussed above, the court of appeals held that the issue of whether Petitioner was entitled to a stay of execution so that counsel could appointed pursuant to 21 U.S.C. § 848(q)(4)(B) was moot. The court gave two reasons for its holding: (i) Petitioner had already received two stays, one from the Fifth Circuit and one from this Court and, furthermore, Petitioner also had counsel, who had sufficient time to prepare a meaningful habeas petition; and (ii) Petitioner had voluntarily dismissed his first habeas petition. See McFarland v. Collins, 8 F.3d 256, 257 (5th Cir. 1993).[12] The court also rejected Petitioner's argument that his appeal fell within this Court's "capable of repetition yet evading review" exception to the mootness doctrine. As the Fifth Circuit reasoned, "[t]he present scenario is not capable of repetition, because Rule 41(a) will not allow successive voluntary dismissals without prejudice." Id. at 257.

The Fifth Circuit's mootness analysis is mistaken, both in its understanding of Petitioner's arguments and in the result. Admittedly, as the court stated, Petitioner's originally scheduled execution was stayed on October 26, 1993 (and remains stayed) in McFarland I, and the underlying habeas corpus petition that was

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[12] The court purported not to reach the specific issue of whether the district court had erred in refusing to appoint counsel because, as the court put it, "the motion for appointment filed in this matter was not ruled upon by the district court, so there is no action to review." Id. at 257 n.1. As explained above, the court was mistaken in so holding because the district court had effectively denied that motion.

filed in this action along with the motion for stay and for the appointment of counsel has been dismissed. However, as explained below, neither of those facts renders the larger issue appealed to the Fifth Circuit non-justiciable. Furthermore, Petitioner disputes the court of appeals' assertion that "Petitioner now has ... counsel ...," McFarland, 8 F.3d at 257, at least insofar as the court was implying that Petitioner has permanent appointed habeas counsel as envisioned by 21 U.S.C. § 848(q)(4)(B). Petitioner has never been appointed counsel by any federal or state court. Rather, as explained in the "statement of counsel" included in Petitioner's Fifth Circuit pleadings, undersigned counsel simply represents Petitioner for the purpose of vindicating his right counsel.

The larger stay issue is not moot, notwithstanding both the entry of a stay and the voluntary dismissal of the underlying habeas petition, because the issue "is capable of repetition yet evading review." Renne v. Geary, 111 S. Ct. 2331, 2338 (1991). At the time that Petitioner requested relief from the Fifth Circuit, the appeal involved a "live controversy": namely, whether the district court erred by denying a stay and refusing to appoint counsel. And the issues raised in that controversy are capable of repetition but evading review. Thus, the mootness exception is applicable. See Renne, 111 S. Ct. at 2338.

Petitioner's Rule 41(a) voluntary dismissal[13] did not render the

[13] As explained above, the voluntary dismissal was done solely to prevent the district court from ruling on the merits of the perfunctory "petition," thus prematurely placing Petitioner

appeal from the denial of the stay moot because *the larger stay issue*, as opposed to the habeas petition dismissal, is still capable of repetition yet evading review. The Fifth Circuit mistakenly assumed that the Rule 41(a) dismissal was what Petitioner referred to when he stated that the larger issue raised on appeal was capable of repetition. Rather, Petitioner was referring to the scenario in which he would again be forced to file a perfunctory habeas "petition" in order to vest the district court with jurisdiction to stay his execution in order to appoint counsel pursuant to 21 U.S.C. § 848(q)(4)(B). As noted, to date, such counsel has never been appointed pursuant to § 848. This scenario thus could arise again. See Lane v. Williams, 455 U.S. 624, 633-34 (1982) ("The [capable-of-repetition exception] is applicable only when there is 'a reasonable expectation that the same complaining party would be subject to the same action again.'") (citation omitted).[14] Likewise, the stay that is presently in effect could, of course, could vacated if this Court denies Petitioner relief in his related appeal. Thus, the present stay does not render the issue incapable of repetition.

The larger issue is capable of evading review, if it were to arise again, because Petitioner could be executed before the issue

in an abuse-of-the-writ posture. Cf. Gosch v. Collins, supra.

[14] Indeed, if this Court were ultimately to hold in McFarland v. Collins, No. 93-6497 (pending on writ of certiorari), that the district court possessed no jurisdiction to stay Petitioner's execution (under either 28 U.S.C. § 1651(a) or 28 U.S.C. § 2251) in order to appoint counsel (under 21 U.S.C. § 848) until a habeas corpus "petition" was filed, this scenario certainly could recur.

is decided by this Court. Of course, there is no assurance that any court, including this Court, would stay his execution if he were to file another perfunctory habeas corpus "petition." Petitioner's death would undoubtedly render the issue moot. Therefore, Petitioner's appeal falls within the well-established exception to the mootness doctrine.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, reverse the judgment of the Court of Appeals, and remand with instructions that counsel be appointed pursuant to 21 U.S.C. § 848(q)(4)(B) and that a stay be entered should the Texas courts schedule Petitioner's execution prematurely. Petitioner suggests that this Court could appropriately consolidate this cause with Petitioner's pending appeal in McFarland v. Collins, No. 93-6497. If this Court ultimately rules against Petitioner in that case on the ground that the district court possessed no jurisdiction to stay Petitioner's execution in order to appoint counsel pursuant to 21 U.S.C. § 848, this case would present the Court with the opportunity to address the larger right-to-counsel issue without any jurisdictional complications, since a petition was pending at the time that the issues were raised.

Respectfully submitted,

FRANK BASIL McFARLAND

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CERTIFICATE OF SERVICE

I, Mandy Welch, a member of the Bar of this Court, hereby certify that true and correct copies of this Petition for Writ of Certiorari, Petitioner's Motion for Leave to Proceed In Forma Pauperis have been sent by first-class mail to:

Enforcement Division
Office of the Attorney General
209 West 14th Street
Price Daniel, Sr. Building
8th Floor
Austin, TX 78701,

this 17th day of February, 1994.

Mandy Welch

Mandy Welch

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FRANK BASIL MCFARLAND

VS. Petitioner,

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent.

NO. 4:93-CV-723-A

O R D E R

Came on to be considered in the above styled and numbered action the motion of petitioner, Frank Basil McFarland, ("McFarland") for stay of execution. The court concludes that the motion for stay should be denied.

On November 15, 1989, McFarland was convicted of capital murder and sentenced to death in the Criminal District Court Number Three of Tarrant County, Texas, the Honorable Don Leonard presiding. On September 23, 1992, McFarland's conviction was affirmed by the Texas Court of Criminal Appeals. McFarland v. State, 845 S.W.2d 824 (Tex. Crim. App. 1992). On June 6, 1993, McFarland's petition for writ of certiorari to the United States Supreme Court was denied. McFarland was represented by counsel each of the above mentioned stages. On August 16, 1993, Judge Ward entered an order scheduling McFarland's execution for November 23, 1993. On June 7, 1993, Judge Drago, sitting for Judge Leonard, ordered McFarland's execution date changed to

Petition for writ of habeas corpus, 3. The petition briefly touches on the alleged deprivation of confrontation and denial of due process, but does not contain any discussion of alleged ineffective assistance of counsel.[1]

The court has conducted an independent review of the September 23, 1992, opinion of the Texas Court of Criminal Appeals on McFarland's direct appeal of his conviction and sentence[2]. McFarland raised on appeal the issues of (i) the trial court's failure to make findings of fact and conclusions of law in ruling on the admissibility of the testimony in question ("first issue") and (ii) failure to hear testimony from McFarland's expert ("second issue"). He did not raise the issue now presented that he was denied effective cross examination and due process. Thus, McFarland did not begin to exhaust his state court remedies as to that issue. Therefore, that issue cannot provide basis for granting habeas corpus relief. Picard v. Connor, 404 U.S. 270, 275-76 (1971); Thomas v. Collins, 919 F.2d 333, 334 (5th Cir. 1990).

The first issue does not raise a claim of constitutional magnitude. As to the second issue, McFarland's petition does not

[1]Based on the very facts recited by McFarland in his petition, a claim of ineffective assistance would not stand on the ground alleged. See Strickland v. Washington, 466 U.S. 668, 687 (1984). In any event, McFarland did not raise this issue on direct appeal nor did he exhaust available state habeas corpus remedies in this regard. Therefore, the court is foreclosed from cosidering the issue.

[2]See McFarland v. State, 845 S.W.2d 824 (Tex. Crim. App. 1992), cert. denied, 113 S. Ct. 2937 (1993).

suggest any legal harm that he has suffered as a result of the state's failure to hear testimony from his expert.

Moreover, as to all theories urged in the petition, the court notes that the trial court found that "the hypnosis neither rendered the post hypnotic memory untrustworthy nor substantially impaired the ability of the opponent to test the witness' recall by cross examination." S.F. vol. 30, 575. Section 2254(d) provides that the fact finding of the state court "shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear" that certain conditions enumerated therein exist. 28 U.S.C. §2254(d). McFarland has not made any allegation that would suggest that the trial court's findings should not be accepted by the court.

Furthermore, the Fifth Circuit noted that "even if McFarland's pleadings are characterized as a federal habeas petition, the district court would be obliged to dismiss it for failure to exhaust the claims." McFarland v. Collins, No. 93-1954 , slip op. at 3, n.1.

For the reasons stated above, McFarland has not satisfied the standard expressed by the United States Supreme Court in Barefoot. Therefore,

The court ORDERS that the motion of McFarland for stay of execution be, and is hereby, denied.

SIGNED October 26, 1993.

JOHN McBRYDE
United States District Judge